Office-Supreme Court, U.S.
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8170

No. 82-5920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KEVIN MICHAEL SHEA,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

SUMMARY OF ARGUMENT

The question raised by Petitioner is whether the *per se* rule announced in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), forbidding reinterrogation of a suspect by law enforcement authorities after the invocation of his right to counsel, should be extended to cases that were on direct appeal on the date *Edwards* was decided. Respondent submits that only prospective application of the *Edwards* rule is mandated by the Constitution insofar as the modern-day retroactivity analysis does not support retroactive application.

The retroactivity of a new constitutional directive is determined by three primary factors, i.e. the purpose to be served by the new rule, the extent of reliance by law enforcement officials on the former constitutional stand-

ards, and the effect on the administration of justice of retroactive application of the new principle. *Stovall* v. *Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967). This Court concluded in *Solem* v. *Stumes*, ___ U.S. ___, 104 S.Ct. 1338 (1984) that the aforementioned factors precluded retroactive application of the *Edwards* mandate to cases on collateral review at the time *Edwards* was decided.

Respondent submits that consideration of the status of Petitioner's case, while relevant, is not a *primary* factor for this Court to consider in determining the retroactivity of *Edwards' per se* rule. Whereas the posture of a case may have greater significance with decisions construing other constitutional dimensions, e.g. *United States* v. *Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982) (Fourth Amendment), it is of lesser importance where the new constitutional dictate is prophylactic in nature.

The purpose of the *Edwards* rule cannot be served by even limited retroactive application. The rule prohibiting reinterrogation of a suspect who has previously invoked his right to counsel was not designed to enhance the accuracy of criminal trials. A defendant could challenge the voluntariness of his statement under the existing substantive tests for voluntariness prior to *Edwards*. Instead, the purpose of the *Edwards* rule is to prevent law enforcement authorities from engaging in overbearing police practices during custodial interrogations. Thus, *Edwards* created a prophylactic rule to guide the conduct of law enforcement authorities. This Court has frequently held that prophylactic rules are not given retroactive effect. *Michigan* v. *Payne*, 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1973); *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

Furthermore, law enforcement authorities justifiably relied on the old standards which delineated the test governing the waiver of *Miranda* rights. Most jurisdictions applied the "knowing, voluntary, and intelligent" test of *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S.Ct 1019, 1023, 82 L.Ed.2d 1461 (1938) on a case-by-case basis. *Edwards* introduced a new, bright-line rule regarding the waiver of the right to counsel: the suspect had to initiate subsequent communication. Prior to *Edwards* law enforcement officers and lower courts justifiably believed that a suspect could waive his right to counsel even if the police initiated the conversation.

Lastly, the retroactive application of *Edwards* to cases on direct appeal at the time *Edwards* was decided would have a disruptive effect on the administration of justice. Respondent submits that a sufficient number of cases exist to warrant only prospective application of the *Edwards* rule. Retrial of convictions obtained many years ago would entail significant hardship upon law enforcement officials. Moreover, these convictions have already been obtained in conformity with previously-announced sound constitutional standards.

Respondent respectfully submits that modern-day retroactivity analysis warrants prospective application of the *Edwards* v. *Arizona* rule from the date of its decision and that our Constitution demands nothing more.

ARGUMENT

I. The Ruling Announced In *Edwards* v. *Arizona* Should Not Apply To Petitioner Shea's Conviction Although His Conviction Was Not Yet Final At The Time Edwards Was Decided.

On February 29, 1984, this Court held in *Solem* v. *Stumes*, ___ U.S. ___, 104 S.Ct. 1338 (1984) that the

bright-line rule announced in *Edwards* v. *Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), would not be applied retroactively to cases on collateral review. Petitioner Shea's conviction, which was pending direct appellate review at the time *Edwards* was decided, was not encompassed by the Court's decision in *Solem*. Indeed, the Court in *Solem* expressly reserved comment on whether the benefit of *Edwards* would be extended to cases having the same status as Petitioner. *Solem*, *supra*, at 1346.

As the majority noted in *Solem*, *Linkletter* v. *Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), *Tehan* v. *Shott*, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966), and *Johnson* v. *New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), set forth the basic principles of retroactive application of new constitutional standards in criminal cases. The Court's analysis includes consideration of:

A) the purpose to be served by the new standards,

B) the extent of the reliance by law enforcement authorities on the old standards, and

C) the effect on the administration of justice of retroactive application of the new standards. *Stovall* v. *Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967).

Upon examining the holding of *Edwards* in light of these factors, a majority of the Court in *Solem* concluded that *Edwards* 1) was a prophylactic rule designed to guide police conduct and shed little light on truth-finding; 2) that law enforcement officers could not have reasonably been expected to foresee its new bright-line approach; and 3) that retroactive application would disrupt the administration of justice. *Solem*, *supra*, at 1345.

Solem reaffirms the analysis utilized in the modern-day retroactivity cases. The *status* of a case, i.e., whether it is on collateral or direct review, is not a primary factor to consider in determining the retroactivity of decisions construing the *Fifth Amendment* right against self incrimination. The posture of the case may take on added weight, however, when the new postulate construes yet another constitutional provision, e.g., *United States* v. *Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982) (Fourth Amendment). The paramount concerns are, again, the purpose to be served by the new rule, the extent of the reliance by law enforcement officials on the old standards, and the effect on the administration of justice.

Respondent admits, however, that the posture of Petitioner Shea's case is relevant. To allege otherwise would be to ignore centuries of interpretation of constitutional law. Respondent respectfully submits that the consideration of the status of Petitioner's case is of lesser importance where the new constitutional dictate is prophylactic in nature. Consideration of the posture of Shea's case is more appropriately addressed upon examination of the effect on the administration of justice of retroactive application of the new standard, rather than as a separate and additional factor.

This conclusion is borne out by the recent decision of the majority in *Solem*. The majority's application of the retroactivity principles does not support Shea's assertion that the status of his case warrants an outcome that differs from the result in *Solem* (Pet. Br. pp. 8-10). Moreover, Justice O'Connor's chambers opinion in *Tate* v. *Rose*, ____ U.S. ____, 104 S.Ct. 2186 (1984), rendered on May 19, 1984, in which the reasoning behind *Solem* was briefly capsulized, fails to illustrate the importance, or

even the consideration of, the status of the case when determining the retroactivity of a new constitutional rule of law.

A. The purpose of the *Edwards per se* approach would not be served by even limited retroactive application.

The decisions of this Court establish that the purpose of the new constitutional rule is to be given paramount consideration. *Brown v. Louisiana*, 447 U.S. 323, 328, 100 S.Ct. 2214, 2219, 65 L.Ed.2d 159 (1980); *Desist v. United States*, 394 U.S. 244, 249, 89 S.Ct. 1030, 1033, 22 L.Ed.2d 248 (1969). The interests of justice and the exigencies of the situation may preclude the retroactive application of a new constitutional decision. *Linkletter v. Walker*, *supra*, 381 U.S. at 628; *Johnson v. New Jersey*, *supra*, 384 U.S. at 726 f; *Solem*, *supra*, at 1341.

"Complete retroactive effect is most appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials." *Id* 104 S.Ct. at 1342, quoting from *Williams v. United States*, 401 U.S. 646, 653, & n. 6, 91 S.Ct. 1148, 1152 & n. 6, 28 L.Ed. 388 (1971). The majority in *Solem* noted that " the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. "*Johnson v. New Jersey*, *supra*, 384 U.S. at 728 f.

Respondent submits that *Edwards* has little to do with guaranteeing the accuracy of the truth-finding function of criminal trials. The purpose of *Edwards* does not implicate the fair determination of guilt or innocence. Rather, its role is protective—it prevents the police from engaging in overbearing police practices during custodial interrogations. Prior to *Edwards* a defendant could challenge the voluntariness of his statement by a motion to

suppress under the existing substantive tests for voluntariness, thus protecting the accuracy of truth-finding at trial. See *Haynes v. State of Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); *Spano v. New York*, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959). As the Court noted in *Solem*, "the fact that a suspect has requested a lawyer does not mean that statements he makes in response to subsequent police questioning are likely to be inaccurate." *Solem*, *supra*, at 1342.

This is particularly evident in Petitioner Shea's case. His confession is more than amply corroborated by the evidence. The coercion which caused so much concern in *Miranda* and *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), and the "badgering" present in *Edwards* simply are not present in Petitioner's case. Thus, the reliability of his statement cannot seriously be questioned.

Most important, however, this Court noted in *Oregon v. Bradshaw*, ___ U.S. ___, 103 S.Ct. 2830, 2834, 77 L.Ed.2d 405 (1983), that the rule of *Edwards* " . . . was in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was." *Solem* verified that rather than creating a new constitutional right, the *Edwards* rule was "designed to implement pre-existing rights." *Solem*, *supra*, at 1343. *Edwards* excludes confessions, even if truthful, obtained beyond constitutional dictates. It is obvious that rather than concerning itself with the reliability of the jury's verdict, *Edwards* seeks to proscribe police conduct.

This Court has frequently held that prophylactic rules are not given retroactive effect. In *Michigan* v. *Payne*, 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed.2d 737 (1973) the

Court held that the prophylactic rule announced in *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), which guards against the possibility of vindictiveness in cases where a judge imposes a more severe sentence upon a defendant after a new trial, would not be applied retroactively. Nor was the prophylactic requirement that counsel be present at lineups given retroactive application. *Stovall* v. *Denno*, *supra*. By their very definition prophylactic rules are designed to prevent particular forms of conduct. Obviously, the purpose of a prophylactic rule cannot be promoted by its application to conduct which occurred prior to the creation of the rule.

Shea's statement was made on July 3, 1979, one year and ten months prior to the *Edwards* decision on May 18, 1981. Respondent is hard-pressed to imagine how the retroactive application of *Edwards* will deter the police "misconduct" that was in accord with prior sound constitutional principles before May 18, 1981.

The remaining factors—the extent of reliance and burden on the administration of justice—are to be relied upon "only when the purpose of the rule in question does not clearly favor either retroactivity or prospectivity." *Desist* v. *United States*, *supra*, 394 U.S. at 251. Respondent submits that the purpose of the rule clearly favors prospectivity. In addition, the State of Louisiana submits that the remaining factors also support the nonretroactivity of *Edwards*.

B. The extent of reliance by law enforcement authorities on the old standards necessitates prospective application.

The majority of the Court in *Solem* left no doubt that *Edwards* established a new rule regulating police conduct. The holding of *Edwards* makes this clear:

> . . . and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. *Edwards*, *supra*, at 484 f.

Previous Supreme Court jurisprudence has refused to adopt *per se* rules governing the waiver of *Miranda* rights. *Michigan* v. *Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); *North Carolina* v. *Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979); *Brown* v. *Illinois*, 422 U.S. 590, 603-604, 95 S.Ct. 2254, 2261-2262, 45 L.Ed.2d 416 (1975). Indeed, even *Miranda* considered that a waiver of one of its warnings would be determined on a case-by-case basis, in each instance ascertaining whether the waiver had been knowing, voluntary, and intelligent, 384 U.S., at 475, 86 S.Ct., at 1628, quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed.2d 1461 (1938).

A great number of lower courts applied the foregoing rationale of *Miranda* and *Johnson* v. *Zerbst*, *supra*, while endeavoring to determine whether the statements given by the suspect were the product of coercion or a knowing and voluntary waiver. The Court in *Solem* indicated that numerous lower federal and state courts opined that a suspect could voluntarily waive his right to counsel after its invocation *even if the police initiated the conversation*. *Solem*, 104 S.Ct. at 1344, n. 8 at p. 1344-1345. See also the original Louisiana Supreme Court Opinion (J.A. 12) and

the Louisiana Supreme Court Opinion on Rehearing (J.A. 26). Admittedly, a few jurisdictions reached the holding of *Edwards* prior to its announcement by this Court. E.g., *United States* v. *Womack*, 54 F.2d 1047, 1050 f. (CA9 1976); *United States* v. *Priest*, 409 F.2d 491, 493 (CA5 1969). However, most law enforcement officers and trial courts did not have benefit of the *Edwards* standard prior to May 18, 1981. They did not have notice that statements taken in violation of that standard may not be used against the accused. Considering this confused state of affairs it can hardly be contended that the police should have anticipated *Edwards' per se* approach.

The bright-line rule in *Edwards* was a necessary one. The state of the law regarding the waiver of the right to counsel after its invocation by a suspect was unclear. *Edwards* sought to shed light on the darkness by declaring that a waiver of the right to counsel could be accomplished in only one manner: the suspect had to initiate subsequent communication. The initiation aspect of interrogation suddenly reached constitutional dimensions with the advent of *Edwards* whereas earlier it was only one of several factors to consider in evaluating a waiver of the *Miranda* rights. A pre-*Edwards* inquiry by a law enforcement officer as to whether a suspect had changed his mind and desired to speak without an attorney would not have jeopardized the suspect's constitutional rights. The same inquiry post-*Edwards* likely will result in the suppression of the statement.

The *Edwards* approach to police activity had not been clearly foreshadowed. *Solem*, *supra*, at 1345. Law enforcement authorities fairly relied on their expectation that a suspect could knowingly and voluntarily waive his right to counsel after its invocation. Under these circumstances, the State of Louisiana submits that reliance on

prior law by both the police and lower courts was justifiable and that these considerations militate against limited retroactive application of the *Edwards* principle.

C. The retroactive application of *Edwards* v. *Arizona* would have a disruptive effect on the administration of justice.

The final criterion is whether retroactive application of the *Edwards per se* rule to cases on direct appeal at the time *Edwards* was decided would have a disruptive effect on the administration of justice. Respondent submits that such would indeed occur.

The administration of our criminal laws would be hampered by the retrial of numerous prisoners already found guilty by trustworthy evidence in conformity with previously announced constitutional standards. *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 731. Although empirical statistics are unavailable, Respondent submits that a sufficient number of cases exist to warrant the nonretroactive application of the *Edwards* rule. See *Tate* v. *Rose*, *supra*, and *State of Connecticut* v. *Lester Smith* (Connecticut Supreme Court Docket No. 12,4506). These cases may be only the tip of the iceberg, albeit a smaller iceberg than the one presented in *Solem*. This Court has noted in previous decisions that investigation and retrial of cases conducted many years ago involves not only expense and effort but the risk of unavailability of witnesses, poor memories, and lost evidence. *Solem*, *supra*, at 1338; *Williams* v. *United States*, *supra*, 401 U.S. 646, 654; *Jenkins* v. *Delaware*, 395 U.S. 213, 220, 89 S.Ct. 1677, 1681, 23 L.Ed.2d 253 (1969).

The above considerations are highly relevant to the State's case against Petitioner. The investigation of the two armed robberies was conducted more than five years

ago. It would impose a severe hardship upon the State if it were required to reconstruct its case against Petitioner. Difficulties in relocating witnesses to the armed robberies are likely to be encountered. To expect those witnesses available for trial to recollect events that occurred so long ago may erect insurmountable barriers for the State.

Of even greater importance is the fact that there is no doubt whatsoever as to the reliability of the jury's verdict which was rendered more than four years ago. The evidence in this case indicates that Mr. Tuminello was robbed of cash and checks by two men after one had fired a pistol shot into the floor. The victim immediately called the police and provided detailed descriptions of his assailants. Shreveport Police officers, having been notified of the robbers' physical descriptions via radio, spotted Petitioner and his accomplice only three blocks away. Pursuant to their arrest, a search of the suspects unveiled a wad of money and checks payable to Tuminello's business, in addition to a revolver with one spent cartridge. Petitioner and his confederate were identified that same day by Mr. Tuminello and Ms. Dick in a six-man lineup.

The State of Louisiana respectfully submits that because the deterrent purpose of *Edwards* overwhelmingly supports nonretroactivity, this Honorable Court should conclude likewise even if relatively few convictions would be set aside by its retroactive application.

CONCLUSION

Simple logic dictates prospective application of the *Edwards* rule from the date of its inception, May 18, 1981. The policies underlying *Edwards' per se* rule cannot be furthered by even limited retroactive application. Police conduct that was in accord with prior sound constitutional principles should remain undisturbed. More than adequate safeguards existed at the time of Petitioner's trial to protect him from the introduction of coerced and involuntary statements. Because the prophylactic purpose of *Edwards* overwhelmingly supports nonretroactivity, the State of Louisiana submits that only prospective application of *Edwards* is mandated by the Constitution.

WHEREFORE, the State of Louisiana respectfully requests that this Court uphold the judgment of the Louisiana Supreme Court and find that Petitioner is not entitled to any relief under *Edwards* v. *Arizona*.

Respectfully submitted,

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CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing brief has been mailed to Ms. Frances Baker Jack, counsel for petitioner, Suite 101, Energy Square, 212 Texas Street, Shreveport, Louisiana, 71101, postage prepaid, this 27 day of July, 1984.

John A. Broadwell
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